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No. 07-1015

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,
Petitioners

v.

JAVAID IQBAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* JAPANESE AMERICAN CITIZENS LEAGUE, PAKISTANI AMERICAN PUBLIC AFFAIRS COMMITTEE, SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM, AND MUSLIM ADVOCATES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Japanese American Citizens League (JACL), the Sikh American Legal Defense and Education Fund (SALDEF), the Pakistani American Public Affairs Committee (PAKPAC), the National Korean American Service & Education Consortium (NAKASEC), and Muslim Advocates, sister entity to the National Association of Muslim Lawyers (NAML) are a diverse group of bar associations, civil rights, civil liberties, public affairs, and not-for-profit organizations dedicated to the principles of equal protection, due process, and the rule of law for every person in the United States of America, including but not limited to minorities, under the Constitution and laws of the United States. [2]

As part of our dedication to these concerns, *Amici* are all committed to protecting the civil rights, liberties and freedoms guaranteed by the Constitution for racial, ethnic and religious minorities, aliens and citizens of America alike. The interests of *Amici* in the fundamental constitutional

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are lodged herewith.

[2] A more detailed statement of the specific interests of each *amicus* is contained in the Appendix to this brief.

and jurisprudential issues raised in the present case are thus aligned with those of respondent and are substantial.

SUMMARY OF ARGUMENT

This case is before the Court to resolve two narrow questions raised by petitioners related to the sufficiency of respondent's First Amended Complaint under the Federal Rules of Civil Procedure. The corollary issues raised by the Petition, however, including petitioners' claims they are immune from all discovery related to respondent's *Bivens* claims of unconstitutional discrimination, give rise to two competing, sometimes conflicting national values. On the one hand "is the importance of a damages remedy to protect the rights" of respondent and other persons under the Constitution and laws of the United States. *Butz v. Economou*, 438 U.S. 478, 504-05 (1978). On the other is "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.* at 506.

The appropriate balance between these important and conflicting values was struck by the Court of Appeals, and should be similarly balanced by this Court, in favor of the respondent's right to proceed with limited discovery against petitioners on his substantial constitutional claims. These claims -- that respondent and other Muslim and/or Arab men were intentionally targeted, detained and mistreated under discriminatory orders created, issued and/or implemented by petitioners after having been classified as "of high interest" to the

Government's investigation into the attacks on September 11, 2001 because of race, ethnicity, national origin, and religion – must be viewed in their proper context and in light of the historic mistreatment of minorities by the Government in times of national crisis. When properly viewed in this context, *Amici* respectfully submit that the Court's "task [is] simple, [its] duty clear," *Korematsu v. United States*, 323 U.S. 214, 223 (1944), and the Second Circuit's decision must be affirmed.

STATEMENT OF THE CASE

In the months after the attacks of September 11, 2001, the Federal Bureau of Investigation ("FBI"), under the direction of petitioner Robert Mueller, "arrested and detained thousands of Arab [and] Muslim men (designated herein as 'post-September 11 detainees') as part of its investigation into the attacks." Appendix to Petition for a Writ of Certiorari ("App.") 75a-76a. The respondent in this case, Javaid Iqbal, a Pakistani citizen of the Muslim faith never accused of or charged with any terrorist activities in connection with the September 11 attacks or otherwise was one of many Muslim and/or Arab men so detained.

At issue here are respondent's allegations of unconstitutional mistreatment while he was detained for a period of more than six months in a severely restrictive federal prison at the Metropolitan Detention Center ("MDC") in Brooklyn, New York, referred to as the "ADMAX SHU" (short for Administrative Maximum Special Housing Unit), created specifically for the purpose

of housing post-September 11 detainees like respondent deemed to be "of high interest" to the Government's investigation. App. 76a. Also at issue is whether the respondent, who alleges that his "of high interest" classification and his related detention and mistreatment in the ADMAX SHU were based solely on his race, ethnicity, national origin, and religion, is entitled to at least limited discovery on his constitutional discrimination claims related to the petitioners' alleged conduct in creating, participating in, ratifying, endorsing and serving as principal architects of the policies which caused respondent's alleged "systematic mistreatment" pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Many facts related to the detention and mistreatment of respondent and other Muslim and/or Arab men while they were detained in the ADMAX SHU are set out in respondent's pleadings. *See, e.g.*, App. 154a-156a, 170a-172a, 176a-177a, 181a, 183a-184a, 185a-187a. (First Amended Complaint ("Compl.") ¶¶ 1-4, 84-91, 112-22, 137-40, 153-54, 164-71). There, respondent has put forth in considerable detail the factual bases for his claims against petitioners, including facts and claims regarding their allegedly discriminatory actions and conduct or misconduct. *See, e.g.*, App. 154a-156a, 157a-159a, 164a, 165a, 168a-170a, 172a-173a, 183a, 190a-191a, 193a-194a, 201a, 202a-204a, 206a-207a, 208a-209a, 213a-214a (Compl. ¶¶ 1-4, 10-17, 46-49, 52-54, 69-70, 74-75, 80-86, 96-98, 151-52, 195-200, 205-06, 232, 235-36, 238-39, 247-48, 250-51, 267-69).

The clear, specific, and detailed factual allegations contained in these paragraphs of respondent's Complaint, as correctly observed by both the District Court and the Second Circuit, must be accepted as true in the current posture of this litigation, "drawing all reasonable inferences in [respondent's] favor." App. 12a (internal citation omitted).

Although other facts related to petitioners' knowledge and motivation at the relevant time have yet to be uncovered, certain additional facts central to this case, including historical facts never disputed by petitioners in these proceedings regarding their personal involvement in and ultimate responsibility for creating the discriminatory governmental policies at issue here, have now been investigated and well-documented by the Office of the Inspector General ("OIG") of the United States Department of Justice ("DOJ"). *See, e.g.,* United States Department of Justice, Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003)("April 2003 OIG Report"). Both the District Court below (*see* App. 76a) and the petitioners in their brief have relied upon this OIG report. *See* Brief for Petitioners, pp. 2, 3, 33.

The OIG was charged by the President, in Section 1001 of the USA Patriot Act (Pub. L. No. 107-56 (2001)), signed into law on October 26, 2001, about six weeks after the attacks of September 11, to review claims of civil rights and civil liberties violations by DOJ employees. *See* April 2003 OIG Report, p. 3 n. 6. Since the release of the April 2003

OIG Report in June 2003, the OIG has issued a number of supplemental reports, as well as regular reports to Congress required by the Patriot Act, regarding the mistreatment of post-September 11 detainees like respondent in the ADMAX SHU. *See, e.g.*, *OIG Report to Congress on Implementation of Section 1001 of the USA Patriot Act* (July 17, 2003)("Report to Congress"); and the OIG's *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* (December 2003)("OIG Supplemental Report"). All of these reports, and the OIG's findings, are today part of the historic public record of events plainly related to this case.

Included in the April 2003 OIG Report is undeniable evidence of the discriminatory impact which the Government's far-reaching post-September 11 investigative and detention policies, practices and procedures had on Arab and Muslim men, like the respondent.[3] According to the OIG's investigation, as of April 2003, it was estimated conservatively that between September 11, 2001 and August 6, 2002, more than 700 aliens were rounded

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[3] As a Pakistani Muslim, respondent is "not an Arab." App. 4a. Nonetheless, "his claim is fairly to be understood as alleging unlawful treatment based on his ethnicity, even if not technically on a racial classification." *Id.* Moreover, respondent's claim, and "his allegations of what was done to Arab Muslims are fairly understood to mean that unlawful actions were taken against him because officials believed, perhaps because of his appearance and his ethnicity, that he was an Arab." *Id.*

up, arrested, and detained as a result of the investigation launched immediately after the September 11 attacks by petitioners Ashcroft, as former United States Attorney General, and Mueller, as Director of the FBI. *See* April 2003 OIG Report at 2.

Many post-September 11 detainees were from Pakistan, Egypt, and other Arab or Muslim countries. In fact, although "[t]he September 11 detainees were citizens of more than 20 countries[,] [t]he largest number, 254 or 33 percent, came from Pakistan, more than double the number of any other country." OIG Report at 21. "The second largest number (111) came from Egypt," while "[n]ine detainees were from Iran and six from Afghanistan." *Id.*

As in respondent's case, most of these detainees deemed to be "of high interest" were apparently never charged or accused of any terrorist activities, but they were nevertheless held for varying periods of time under incredibly restrictive conditions in the ADMAX SHU. *Id.* at 27. It was there, according to the respondent and many other post-September 11 detainees kept in the ADMAX SHU whose complaints were investigated by the OIG, that a series of unconstitutional deprivations took place, for which the respondent seeks redress from the petitioners, former Attorney General Ashcroft and FBI Director Mueller, and others downstream from them within the DOJ and FBI and the federal Bureau of Prisons (BOP).

As correctly explained by the District Court, respondent alleges that, while confined in the ADMAX SHU, he was "subjected to, among other things, severe physical and verbal abuse; unnecessary and abusive strip and body-cavity searches; extended detention in solitary confinement; deliberate interference with the exercise of [his] religious beliefs; and deliberate interference with [his] attempts to communicate with counsel." App. 73a-74a, 79a-80a. Similar claims of mistreatment made by other post-September 11 detainees in the ADMAX SHU have been made in well-publicized reports of alleged civil rights violations committed in the wake of September 11. *See, e.g.,* "Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," Human Rights Watch (August 2002); and "A Year of Loss: Reexamining Civil Liberties Since September 11," Lawyers Committee for Human Rights (September 5, 2002).

More significant than these are certain supporting findings, as well as corroborating evidence, contained and referred to in the April 2003 OIG Report and the Supplemental OIG Report about the systematic and daily mistreatment of post-September 11 detainees. All of these findings, including but not limited to evidence corroborating respondent's claims that he suffered from religious interference and harassment because of his Islamic faith while detained in the ADMAX SHU (see OIG Report at 147-48), strongly suggest that respondent's claims of discrimination against petitioners and other defendants remaining in this action are not merely "possible," but plausible, as discussed below.

Consistent with respondent's claims in this case, the April 2003 OIG Report determined, among other things, in its chapter on the "Conditions of Confinement at the Metropolitan Detention Center in Brooklyn, New York," that "fear of additional terrorist attacks in New York City and around the country changed the way aliens detained in connection with the investigation of September 11 attacks were treated." April 2003 OIG Report at 111. The April 2003 OIG Report also determined, *inter alia*, that:

> (1) the DOJ "did not initially give the [federal Bureau of Prisons] any guidance on how to confine the detainees" (*id.* at 112);
>
> (2) certain high-ranking officials within the Attorney General's Office knew that detainees were being held under "the most secure conditions possible" and approved of these conditions (*id.* at 112-13);
>
> (3) "detainees in the ADMAX SHU [were] restricted to their cells, ha[d] limited use of telephones with strict frequency and duration restrictions, and can only move outside their cells for specific purposes and while restrained and accompanied by MDC staff" (*id.*);
>
> (4) "MDC officials relied on the FBI's assessment that the detainees generally were 'of high interest' to its ongoing terrorism investigation and automatically placed them

in the MDC's most restrictive housing conditions" (*id.* at 126);

(5) "MDC staff . . . believed that the September 11 detainees who were sent to the MDC were 'suspected terrorists'" even though "the FBI did not have a formal process for making an initial assessment of a detainee's possible links to terrorism, and this assessment lacked specific criteria and was applied inconsistently" (*id.* at 126-27);

(6) there were inconsistencies in detainee assignment and reassignment procedures (*id.* at 129-30);

(7) the "decision to house September 11 detainees in the most restrictive confinement conditions possible severely limited the detainees' ability to obtain, and communicate with, legal counsel" (*id.* at 130);

(8) detainees were prevented or impeded from visiting with family members (*id.* at 138); and

(9) contact by detainees with foreign consulates was also inhibited (*id.* at 140, 141).

Also relevant here are findings contained in the OIG reports supporting respondent's essential claims that (1) petitioner Ashcroft, as the Attorney General, had "ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws" and was "a principal architect of the policies and practices challenged

here" as "[h]e authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions under which [respondent and other detainees like him] were detained" (App. 157a); and (2) petitioner Mueller, as Director of the FBI, "was instrumental in the adoption, promulgation, and implementation of the[se] policies and practices." (*Id.*).

For example, according to the OIG Report, almost immediately after the September 11 attacks, the FBI initiated a "massive investigation," called PENTTBOM, "focused on identifying the terrorists who hijacked the airplanes and anyone who aided their efforts." April 2003 OIG Report at 1. The OIG also found that almost immediately after the attacks took place, "the Attorney General directed the FBI and other federal law enforcement personnel to use 'every available law enforcement tool' to arrest persons who 'participate in, or lend support to, terrorist activities.'" *Id.* (quoting from a Memorandum from petitioner Ashcroft entitled "Anti-Terrorism Plan," dated September 17, 2001). Pursuant to petitioner Ashcroft's Anti-Terrorism Plan, "[o]ne of the principal responses by law enforcement authorities after the September 11 attacks was to use the federal immigration laws to detain aliens suspected of having possible ties to terrorism." *Id.*

Respondent alleges it was pursuant to these policy directives and orders that he was deemed to be "of high interest" to the government's terrorism investigation, and it was as a result of this classification that respondent was kept in the ADMAX SHU, with the knowledge of the petitioners

and at their direction, "under harsh conditions, solely because of his race, ethnicity, and religion." App. 59a. In fact, respondent alleges, among other things, as the Second Circuit also observed, that petitioners, along with the other defendants originally named as such, "specifically targeted [him] for mistreatment because of [his] race, religion, and national origin." *Id.* As result of this alleged systematic discriminatory treatment of respondent and other similarly situated Muslim and/or Arab men detained as "of high interest" to the government's investigation, respondent maintains that the petitioners, *inter alia*, violated his civil rights in violation of the First, Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution.

ARGUMENT

POINT I

WHEN VIEWED IN THEIR PROPER HISTORICAL CONTEXT, RESPONDENT'S CONSTITUTIONAL DISCRIMINATION CLAIMS AGAINST PETITIONERS ARE ENTIRELY PLAUSIBLE

A. This is Not the First Time That the Government Has Detained and Violated the Well Established Constitutional Rights of Minorities in the Name of National Security

In a number of recent cases decided since the September 11 attacks, this Court has considered the detention and treatment of persons detained as "enemy combatants" by the Executive Branch in the wake of the Government's self-declared "Global War

on Terror." *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-55 (2004)(observing that "freedom from indefinite imprisonment at the will of the Executive" is at the "very core of liberty" in our "system of separated powers"); *Boumediene v. Bush*, 128 S.Ct. 2229, 2242 (2008)(rejecting the Government's efforts to exclude the constitutional right of *habeas corpus* for Guantanamo Bay detainees); *Rasul v. Bush,* 542 U.S. 466 (2004)(holding that foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay have the statutory right to challenge their detention in federal district courts). In each of these cases, the Court has made it clear "that a state of war is not a blank check for the President." *Hamdi,* 542 U.S. at 536 (O'Connor, J.). The Court has likewise made it clear that "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Id.* at 532 (citing *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 164-165 (1963)).

In each of these cases, the Court necessarily considered the historical context within which the Government's actions in a time of national crisis have been challenged. *See, e.g. Hamdi*, 542 U.S. at 600 (noting that "as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of

others who do not represent that sort of threat"). Similarly here, a proper historical context is critically important to the Court's evaluation of respondent's claims, as well as of petitioner's claims of qualified immunity.

In fact, as petitioners concede: "Determining whether a given set of alleged facts is sufficient to state a claim is not possible in the abstract. Rather such allegations must be considered in the particular context of the specific claims being raised, and thus 'context' will affect 'the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations.'" Petitioners Brief at 27. The District Court agreed, explaining that this case may not be viewed in a vacuum (App. 76a), but must be viewed in the context of what we now know (largely thanks to the OIG's investigation and reports) about the Government's response to the September 11 attacks, and the petitioners' participation in and involvement in the detention and treatment of aliens considered "of high interest" in the ADMAX SHU.

Amici further submit that respondent's claims of systemic governmental discrimination because of his race, ethnicity, national origin and religion, and the petitioners' asserted defenses of qualified immunity, must also be viewed in a deeper historical and jurisprudential context that began long before September 11, for this is not the first time in America's history where due process and basic constitutional guarantees were denied to a group of persons based solely on their race, national origin, ethnicity and/or religion. And this is not the first

time this Court has been called upon, in a similar context involving a time of national crisis and panic, to review the plainly discriminatory actions of high-ranking government officials taken in the name of national security.

Sixty-five years ago, in *Hirabayashi v. United States*, 320 U.S. 81 (1943), this Court was asked to determine whether a war-time curfew imposed on Japanese citizens and aliens on the West Coast of the United States in response to the attacks on Pearl Harbor by the Japanese air force on December 7, 1941 unconstitutionally discriminated against persons of Japanese ancestry in violation of the Fifth Amendment. The Court considered these claims in their historical context and "in light of the conditions with which the President and the Congress were confronted" at the time, noting that the United States was at war with Japan and that many of these asserted conditions, "since disclosed, were then peculiarly within the knowledge of the military authorities." *Id.* at 93-94.

Regrettably, the Court then gave the government a constitutional pass in light of the exigent war-time circumstances then existing and the relatively "mild and temporary deprivation of liberty" found to be at issue (323 U.S. at 241), and out of deference to the Government's assertions of military necessity for their actions. In the process, however, the Court in *Hirabayashi* was careful to explain certain otherwise bedrock principles, with Justice Stone rightly exclaiming that:

> **Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.**

320 U.S. at 100 (emphasis added); *see also* concurring opinion of Murphy, J., likewise observing that "[d]istinctions based on color and ancestry are utterly inconsistent with our traditions and ideals." *Id.* at 110.

A little more than one year later, in *Korematsu v. United States*, 323 U.S. 214 (1944), this Court revisited certain of the assumptions upon which *Hirabayashi* was based. This time though, the issue was the constitutionality of another, far more devastating deprivation of individual and personal liberty for persons of Japanese ancestry in America like, Fred Korematsu, who were ordered by the government excluded because of their ancestry from remaining in certain designated "military areas" in the months after the Pearl Harbor attacks.

Again in *Korematsu*, as in *Hirabayashi,* this Court sided with and deferred to the Government in refusing to strike down a facially discriminatory exclusion order that singled out an entire race of people based on their Japanese ancestry. In so doing, the Court found that there was no racial discrimination involved. Of course, on the record

currently before this Court, with no discovery yet conducted of the petitioners, it is far too early to leap to any such ultimate factual conclusion here. Nevertheless, in finding there was no unlawful discrimination in *Korematsu*, the Court deferred to certain unjustified and never proven assumptions made by the Government about the loyalty of all persons of Japanese descent in the United States to Japan at a time of war with America, and to certain misrepresentations made by the Government both at trial and subsequently before this Court, about the need for the internment of nearly 120,000 aliens and citizens of Japanese ancestry.

We now know, however, thanks to the subsequent investigation and report of the Commission on Wartime Relocation and Internment of Civilians, established by Congress in 1980 to review the treatment and detention of those of Japanese ancestry during World War II, "that military necessity did not in fact warrant the exclusion and detention of ethnic Japanese." *Korematsu*, 584 F. Supp at 1416. We also know now that there was considerable evidence to the contrary (including internal memoranda and letters to and/or from high-ranking officials in the Attorney General's Office at that time), which was never disclosed and which was later determined to have been concealed by the Government both at trial and before this Court on the critical issue of military necessity for the mass-internments and detentions of the Japanese on American soil. *See* Nelson Lund, *Symposium on Confronting Realities: the Legal, Moral, and Constitutional Issues Involving Diversity: Panel I: Racial Profiling; the Conservative*

Case Against Racial Profiling in the War on Terrorism, 66 Alb. L. Rev. 329, 339-40 (2003) ("Not only did the government continue to defend the program, it concealed from the Supreme Court what it knew about the absence of any real threat").

This governmental misconduct in *Korematsu* eventually resulted in the vacating of Mr. Fred Korematsu's conviction by the trial judge after that conviction was affirmed by this Court. *See Korematsu*, 584 F. Supp. 1406, 1416-19 (N.D. Cal. 1984)(granting Korematsu's petition for a writ of *coram nobis*). But it was not until forty years after *Korematsu* was decided by this Court that the government's misconduct in putting "a selective record before this Court and the trial court was corrected by the trial judge. *Id.* For this reason and others, this Court's decision in *Korematsu* has been described as "an anachronism in upholding overt racial discrimination as 'compellingly justified.'" *Id.* at 1420 (also observing, as noted by former Justice Powell in *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980), that *Korematsu* and *Hirabayashi* are the "[o]nly two of this Court's modern cases [to] [hold] the use of racial classifications to be constitutional").

But as Judge Patel further noted in her 1984 decision, this Court's decision in "*Korematsu* remains on the pages of our legal and political history" for whatever limited precedential value it may have. *Korematsu*, 584 F. Supp. at 1420. And, before all of *Korematsu's* teachings are cast aside, the Court should recall that, in language no less as emphatic than *Hirabayashi's* strongly worded condemnation of odius racial distinctions, this Court

again explained in *Korematsu*, in no uncertain terms, that racially motivated governmental restrictions imposed on aliens and citizens solely because of their race are inherently suspect and anathema to the ideals of freedom and liberty guaranteed by the Constitution. As Justice Black explained at the outset of the decision in *Korematsu*:

> It should be noted, to begin with, that ***all legal restrictions which curtail the civil rights of a single racial group are immediately suspect***. That is not to say that all such restrictions are unconstitutional. It is to say that ***courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.***

323 U.S. at 216 (emphasis added).

These principled and unequivocal statements are more than merely dicta. They are, on the contrary, fundamental principles reflective of the well-established idea, embedded in Fifth Amendment's Due Process Clause and in the Equal Protection Clause of the Fourteenth, that "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Hirabayashi v. United States*, 320 U.S. at 100. *Amici* also maintain that these basic principles are as easily understood today by reasonable people as they would have been 65 years ago when *Korematsu* was decided by this Court, as clearly prohibiting intentional racial

discrimination by the Government even in times of war.

Petitioners do not contend otherwise, and they have not argued here that their allegedly discriminatory conduct, if indeed that is what it was, would not have violated clearly established statutory and constitutional rights which a reasonable person would have known. Nor would any such argument be tenable. Indeed, even the Court in *Korematsu* acknowledged, as the Court should again acknowledge in the present case, that "[o[ur task would be ***simple***, our duty ***clear, were this a case involving the imprisonment of a [person] because of racial prejudice.***" 323 U.S. at 203 (emphasis added). Of course, respondent alleges that this is just such a case.

Fred Korematsu passed away not long ago, but in the year before he died he addressed this Court, and some of the underlying historical facts and issues raised by respondent's pleadings in this case, as a "friend of the Court" in *Rasul v. Bush*, 542 U.S. 466 (2004). *See* Brief of *Amicus Curiae* Fred Korematsu in Support of Petitioners (January 14, 2004). Mr. Korematsu's case, as well as his amicus brief and his impassioned pleas to this Court in that case --- urging the Court to view the Government's response to the September 11 attacks in light of the well-documented history of unnecessary restrictions placed on the civil liberties of immigrants and minorities in the United States during times of national crisis – should echo and reverberate loudly here.

Indeed, like the facts laid bare in the OIG's investigation and report, the facts of *Korematsu* and some of the lasting principles of liberty and equality articulated there speak out just as loudly today as they did 60 years ago against "racial antagonism" and in favor of the need to review with "the most rigid scrutiny" "all legal restrictions which curtail the civil rights of a single racial group." *Korematsu,* 323 U.S. at 216. And, like Judge Patel's cautionary words in granting Mr. Korematsu's *coram nobis* petition, the facts and this Court's decision in *Korematsu* still stand before this Court:

> [a]. . . as a constant caution that ***in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees***. . . . [b] as a caution that ***in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability***. . . . [and,] [c] as a [further] caution that ***in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens [and persons] from the petty fears and prejudices that are so easily aroused***.

Korematsu, 584 F. Supp. at 1420 (emphasis added).

B. The Substantial Public Record of Petitioners' Knowledge and Involvement in the Unconstitutionally Discriminatory Detention and Mistreatment of Muslim and/or Arab Men Like Respondent Provides Further Context and Plausibility to Respondent's Claims

Respondent's claims against petitioners, and petitioners' claims of immunity, must also be viewed in the context of the substantial public record that has now been created regarding the Government's detention and mistreatment of Muslim and/or Arab men considered "of high interest" to the massive federal investigation launched by petitioners after the September 11 attacks. This substantial historical record, including but not limited to the OIG's reports, supports the respondent's claims against petitioners and shows that they are indeed entirely plausible.

As the District Court found below, the April 2003 OIG Report and "the post-September 11 context provide[] support for [respondent's] assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process." App. 116a. In fact, as the District Court explained, "[t]he April 2003 OIG report . . . suggests the involvement of Ashcroft, the FBI Defendants, and the BOP Defendants in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities." *Id.* 116a-117a (citing the April 2003 OIG Report, pp. 37-39, 42, 49,

60, 69-71, 112-13, 116). Subsequent OIG reports lend additional factual support to respondent's claims in this regard. *See e.g.,* the OIG Supplemental Report, and the OIG's July 17, 2003 Report to Congress.

For example, each of these OIG reports examines and evaluates the treatment of alien detainees like respondent held on immigration charges (not consistently enforced before September 11) in connection with the Government's investigation into the September 11 attacks. Supplemental OIG Report at 1. Each report focuses on exactly how "the Department of Justice," headed at the time by petitioner Ashcroft, "handled these detainees, including their processing, their bond decisions, the timing of their removal from the United States or their release from custody, their access to counsel, and their conditions of confinement." *Id.* Each concludes, while recognizing the serious difficulties and challenges the DOJ faced responding to the attacks, that there were "significant problems in the way the Department handled the September 11 detainees." *Id.* at 13; *see also* April 2003 OIG Report at 195.

In addition, each of the OIG's reports, including but not limited to the OIG's July 17, 2003 Report to Congress, finds unequivocally, among other things, that there is evidence of "a pattern of physical and verbal abuse by some correctional officers against some September 11 detainees, particularly during the first months after the attacks and during intake and movement of prisoners." July 2003 Report to Congress at 14. Lending further

support and plausibility to respondent's specific claims against the petitioners, these OIG reports tie this mistreatment and abuse to the emotionally charged and angry atmosphere at the MDC immediately after the September 11 attacks, and to "the vague label attached to the detainees" by the petitioners as "of high interest." Supplemental OIG Report at 4. As the OIG explains, "based on the vague label attached to the detainees by the FBI, the MDC staff initially was lead to believe that the detainees could be terrorists or that they may have played a role in the September 11 attacks." *Id.* Importantly, the OIG has also concluded

> [T]he Department used federal immigration laws to detain aliens in the United States who were suspected of having ties to the September 11 attacks or connections to terrorism, or who were encountered during the course of the terrorism investigation conducted by the [FBI]. In the first 11 months after the attacks, 762 aliens were detained in connection with the FBI terrorism investigation for various immigration offenses, including overstaying their visas and entering the country illegally.
>
> A total of 84 of these aliens were confined at the MDC on immigration charges in the 11 months after the attacks. The facility at which a September 11 detainee was confined was determined mainly by the FBI's assessment of the detainee's potential links to the September 11 investigation or ties to terrorism. The FBI assessed detainees as 'high

> interest,' 'of interest,' or 'undetermined interest.' Generally, those labeled of 'high interest' were confined at the MDC.

Supplemental OIG Report at 2.

Notwithstanding these and other finding by the OIG, and notwithstanding "factually suggestive" allegations in respondent's pleadings "from which a reasonable inference of illegal conduct may be drawn" (Petitioner's Brief at 24), petitioners suggest that, given their high-ranking positions within the Government at the time, it is not plausible to believe that they would have been "personally involved in any discriminatory decision, or that they personally acted with any invidious discriminatory purpose toward respondent." Petitioners' Brief at 31. Petitioners similarly ask this Court to find, before they have been subjected to any discovery whatsoever, that the Second Circuit was somehow wrong to conclude that there is a "likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." App. 62a.

When the allegations of respondent's pleadings are viewed in their proper historical context, however, both common sense and the findings of the OIG support the Second Circuit's conclusions in this regard and counsel against accepting petitioners' arguments. Indeed, the OIG's reports, as the District Court found, support

respondent's assertions that petitioners were in fact intimately involved, at the highest levels of the Government's post-September 11 investigation, "in creating and/or implementing the detention policy under which [respondent and other Muslim and/or Arab men considered 'of high interest'] were confined without due process." App. 116a.

C. The Second Circuit's Decision is Consistent With This Court's Longstanding Refusal to Allow the Attorney General and Other Executive Branch Officials to Carry Out Their National Security Functions Wholly Free from Concerns for Personal Liability

Even in times of heightened national security, this Court has previously held that the Attorney General and other Executive Branch officials are not absolutely immune from either scrutiny or a *Bivens* suit for damages – and from the threats, inconveniences and costs of litigation in cases like this one – for their clear violations of the Constitution and Congressional enactments. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). In fact, this issue was squarely addressed and put to bed in *Mitchell*.

There, applying the "new" objective standards of qualified immunity set forth three years earlier in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court compared the functions of the Attorney General acting in times of asserted "national security" with those of the President, legislators, judges, prosecutors, and one or two others for whom an absolute immunity from suit has been found

appropriate. In the end, however, the Court in *Mitchell* found, in a case where "[d]iscovery and other preliminary proceedings had dragged on for . . . five-and-a-half years" (*Mitchell*, 472 U.S. at 515), that "the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions." *Id.* at 520. Neither the FBI Director nor any of the other petitioners, all holding Executive Branch positions of similar or lesser rank and function than petitioner Ashcroft, stand on any different ground.

In *Mitchell*, again following *Harlow's* holding that qualified, not absolute immunity, is generally the only shield for the Attorney General and other members of the Executive Branch, the Court was careful to "emphasize that the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints." *Id.* at 524. Instead, "[u]nder the standard of qualified immunity articulated in *Harlow . . .* , the Attorney General will be entitled to immunity [only] so long as his actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mitchell*, 472 U.S. at 524 (citing *Harlow*). As further explained by Justice White in *Mitchell*:

> [T]he Attorney General will be entitled to immunity so long as his actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' . . . This standard will not allow the Attorney General to carry out his

> national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: 'Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. . . . This is as true in matters of national security as in other fields of governmental action. We do not believe the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

Id. (emphasis in original)(internal citations omitted).

In this case, whether or not the Attorney General paused when carrying out his national security functions in the wake of the September 11 attacks to consider whether or not the allegedly discriminatory detention and mistreatment of respondent and other Muslim and/or Arab men in the ADMAX SHU could be squared with the Constitution and laws of the United States is a matter as yet undiscovered. Petitioners nevertheless seek a decision from this Court, in the guise of their request to find that respondent's initial pleadings fail to state a claim, effectively providing them with what the Court in *Mitchell* refused to give: namely, absolute immunity from suit and from any and all

discovery on this and other issues related to their defense of immunity. Indeed, petitioners' arguments before this Court, though not expressly couched in the language of absolute immunity, would bring about the same result. That is because petitioners seek a ruling from this Court, contrary to the rulings below, that precludes the conduct of even limited discovery related to their immunity defenses based solely on the initial pleadings. The Court should deny this veiled attempt at obtaining a grant of absolute immunity for the petitioners' post-September 11 unconstitutional conduct in the name of "national security."

But Harlow made it clear, and *Mitchell* reinforced the rule, that dismissal of a *Bivens* suit like this one -- before any discovery at all is conducted – is only appropriate where it can be decided as a matter of law, pursuant to Rule 12(b)(6) or Rule 56, that the government official in question's "conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known." 457 U.S. at 817. This is simply not that kind of case, as the District Court and Second Circuit found below, at least not with respect to respondent's claims of discrimination because of race, national origin, ethnicity, and religion.

Nor is this a case where the pleadings fail to state a colorable and plausible claim for relief against the petitioners. Only if it were, *Harlow* held, would pre-discovery dismissal be allowable at the pleading stage. But in a case like the present one, where the complaint adequately alleges the

commission of acts that violated clearly established law, "a plaintiff's claims of constitutional violation – even against a former Attorney General – must at least be allowed to continue to the discovery phase." *Mitchell, supra*. This is just such a case and the Second Circuit's well-balanced approach in allowing discovery to proceed as against the petitioners in a structured and limited manner that will preserve both respondent's and petitioners' rights to seek summary judgment on their immunity defense after discovery is completed are entirely consistent with this Court's precedents.

POINT II

GRANTING PETITIONERS' REQUEST FOR IMMUNITY FROM ALL DISCOVERY BASED SOLELY ON THE PLEADINGS WILL PLACE AN UNDUE BURDEN ON CIVIL RIGHTS PLAINTIFFS AND WILL SOUND THE DEATH KNELL TO THE PRINCIPLES UNDERLYING *BIVENS*

A. The Second Circuit Firmly and Properly Applied the Notice Pleading Requirements of the Federal Rules and this Court's Precedents

Both the Second Circuit and the District Court denied petitioners' respective motions to dismiss respondent's discrimination and conspiracy claims, *inter alia*, pursuant to Fed. R. Civ. P. 12(b)(6). Petitioners' motion was based on grounds of qualified immunity, a ground rejected by the Second Circuit and as to which *certiorari* was neither requested nor granted by the Court, and on respondent's purported failure to either state a non-conclusory claim upon which relief could be granted, or to allege any personal involvement on the part of petitioners Ashcroft and Mueller showing that they were responsible for respondent's discriminatory mistreatment and resulting damages.

In rejecting these asserted grounds for pre-answer and pre-discovery dismissal, and in finding that respondent is entitled to at least limited discovery from the petitioners on the claims made against them, the Second Circuit pointed to certain clear and specific allegations made by respondent in

his pleadings that "he was deemed to be 'of high interest,' and accordingly was kept in the ADMAX SHU under harsh conditions, solely because of his race, ethnicity, and religion" and all of the defendants, petitioners included, "specifically targeted [him] for mistreatment because of his race, religion, and national origin. *Id.* Based on these and other specific allegations about the petitioners' alleged conduct in creating, authorizing, ratifying, endorsing, implementing and serving as the principal architects for the discriminatory policies challenged here, the Second Circuit correctly found, notwithstanding petitioners' arguments to the contrary, that the allegations set forth in respondent's pleadings "are sufficient to state a claim of animus-based discrimination that any 'reasonably competent officer' would understand to have been illegal under prior case law." *Id.* This was the right decision because the historical context of this case makes respondent's claims entirely plausible, if not likely.

The Second Circuit further held, correctly we submit, "that courts cannot require a heightened pleading standard for civil rights complaints involving improper motive" and that respondent's allegations of personal involvement by the petitioners – including but not limited to respondent's claims "that Ashcroft and Mueller 'knew of, condoned, and willfully and maliciously agreed to subject [respondent] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest" – "satisf[y] the plausibility standard without an allegation of

subsidiary facts" such as the petitioners would insist upon under *Bell Atlantic v. Twombly*, 127 S.Ct. 1955 (2007). App. 62a.

The court's decision in this regard was fully in accord with *Twombly* and with the "firm application" of the Federal Rules of Civil Procedure which petitioners' themselves urge the Court to follow here. *See, e.g.,* Petitioners' Brief at 15 (quoting *Butz v. Economou,* 438 U.S. 478, 508 (1978). By its express terms, Fed. R. Civ. P. 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." The Second Circuit firmly applied this rule and refused petitioners' urgings to adopt what amounts to nothing less than a heightened pleading standard in civil rights and constitutional discrimination cases like this one. In so doing, the Second Circuit properly found that to grant petitioners' request would require an amendment of the Federal Rules of Civil Procedure by Congress. *See* App.25a-26a.

Petitioners now seek the same relief from this Court, even though the plain language of Rule 8(a) and this Court's precedents mandate the conclusion that no such heightened pleading standard may be imposed by judicial fiat or interpretation of rules that are clear on their face. Thus, in *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007), this Court held that a prisoner bringing a Section 1983 claim is not required to state "specific facts" in his complaint. All that is required under Rule 8(a)'s simplified "notice" pleading standard, *Erickson* held, is that the complaint "give the defendant fair notice of what the

. . . claim is and the grounds upon which it rests." *Id.* (citing *Bell Atlantic*, 127 S.Ct. at 1964).

This clear reading of Rule 8(a) and of *Bell Atlantic* notwithstanding, petitioners demand a new interpretative rule from the Court in this case – applicable only in civil rights cases brought under *Bivens* against high-ranking government officials for the violation of clearly established constitutional rights – requiring plaintiffs like respondent to specify in their complaints exactly which steps were taken when, by whom, and where, and when, by whom, and where any approval, condonement or ratification of any of the actions were taken). Petition for a Writ of Certiorari at 17. Never before has such a fact-specific and defense-specific pleading standard been required by the Court of any other civil rights plaintiffs, and the Court should reject this approach altogether.

Furthermore, the petitioners' reading of *Twombly* is entirely at odds with every Circuit Court but the Ninth in refusing to read *Twombly* as requiring a heightened pleading standard, or requiring that specific facts be pleaded unless required by Fed. R. Civ. P. 9(b). *See, e.g., Thomas v. Rhode Island*, No. 07-1985, 3 2008 WL 4335102, *3 (1st Cir. 2008); *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008); *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008); *Giarratano v. Johnson*, 521 F.3d 298, 304 n. 4 (4th Cir. 2008) ("[In *Erickson*] the Supreme Court, citing *Twombly*, reiterated that Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to

relief.."); *In re Katrina Canal Breach Litigation*, 495 F.3d 191, 205 n. 10 (5th Cir. 2007); *United States v. Ford Motor, Co.*, 532 F.3d 496, 503 n.6 (6th Cir. 2008); *Limestone Development Corp. v Village of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) ("*Bell Atlantic* must not be overread."); *Gregory v. Dillards, Inc.*, 494 F.3d 694 (8th Cir. 2007); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008); *Davis v. Coca-Cola*, 516 F.3d 955, 974 n. 43 (11th Cir. 2008); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007); *Aktieselskabet v. Fame Jeans Inc.,* 525 F.3d 8, 15 (D.C. Cir. 2008) ("*Twombly* leaves the long-standing fundamentals of notice pleading intact").

Petitioners' position here conflicts with all of these decisions and goes beyond even the Ninth Circuit's over-expansive reading of *Twombly. See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 n.5 (9th Cir. 2008). Either way, the heightened pleading standard advanced by petitioners and by the Ninth Circuit in *Kendall* finds no support in either the text of Rule 8(a), its legislative history, or the decisions of this Court both before and after *Twombly.*

B. A Heightened Pleading Standard Would Unduly Burden Civil Rights Plaintiffs

Amici are deeply concerned that if the Second Circuit's well-balanced and reasoned decision is not upheld, and if the heightened pleading standard urged by petitioners is adopted by the Court in cases of this kind, the result will be to effectively foreclose judicial recourse to plaintiffs, like respondent, who have been injured by the constitutional violations of

high-ranking government officials. However, the very same concerns which have compelled this Court to reject the imposition of heightened pleading requirements for civil rights plaintiffs in other contexts also obtain in this case.

For example, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168 (1993), the Court unanimously overruled the Fifth Circuit's imposition of a heightened pleading standard for § 1983 plaintiffs on two grounds. The first was that qualified immunity did not work a governmental immunity from suit. *Id.* at 166-67. The second was that a judicially imposed pleading standard would encroach upon Congress' exclusive authority to do so through amendment to the Federal Rules. *Id.* at 168. Similarly, in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), this Court overruled an earlier attempt by the Second Circuit to impose a heightened pleading standard on employment discrimination plaintiffs which would have required they plead a *prima facie* case. 534 U.S. 506, 510 (2002). In rejecting such an approach in *Swierkiewicz,* the Court noted that discovery rules were designed to unearth the facts needed to meet this standard and that imposition of a higher standard at the pleading stage would work to foreclose colorable employment discrimination claims. *Id.* at 512. Further, the Court reoriented the Circuit Courts around Rule 8(e)(1)'s "simplified notice pleading" regime and reiterated, citing *Leatherman,* that amendment of the Federal Rules is the exclusive province of Congress. *Id.* at 514-15.

The petitioners' reading of *Twombly* conveniently ignores the well-grounded bases for these precedents in an attempt to create a further barrier to suit at the pleading stage in any case where a civil rights plaintiff seeks to hold high-level Government officials accountable for unconstitutional actions taken in the name of national security. Indeed, petitioner's reading of *Twombly* would impose upon respondent and other civil rights plaintiffs the impossible task of pleading a *prima facie* case prior to discovery, however, in a situation where the petitioners hold all the cards and are in possession of all evidence regarding their objective motivations and knowledge at the time in question.

Obviously, to adopt petitioners' suggested approach would greatly inhibit the access of civil rights litigants to the federal courts and thus limit a critical tool for combating racial injustice. *See* Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L. J. 85, 107 (1994) (articulating the primacy of civil rights litigation in the struggle for equality). See also Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270, 300-01 (1989) (observing that a heightened standard would disproportionately impact civil right litigants by requiring specificity in their pleadings when they lack the financial resources to do so). For these reasons as well the Court should reject petitioners' proposed heightened standard of pleading.

C. The Principles *Bivens* Was Based Upon Remain Valid and Must Be Preserved

In *Bivens*, this Court held that the petitioner, having been subjected to what he alleged was a grossly unreasonable search, seizure, and arrest accompanied by unreasonable force in violation of the Fourth Amendment, stated a cause of action and was entitled to pursue his claims for money damages in federal district court for any injuries he suffered at the hands of federal narcotics agents. 403 U.S. at 397. The Court in *Bivens* thus confirmed, among other things, that the teachings of *Marbury v. Madison*, 1 Cranch 137, 163 (1803) are still valid. In *Marbury*, the Court held, as Justice Brennan explained again in *Bivens*, that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim protection of the laws, whenever he receives an injury." *Bivens*, 403 U.S. at 397 (quoting Justice Brennan *Marbury,* 1 Cranch at 163).

Both *Bivens* and *Marbury*, thus stand as shining examples of the fact that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens, supra*. (internal citations omitted). The Court in *Bivens* similarly affirmed the "well settled" rule announced by this Court in *Bell v. Hood*, 327 U.S. 678 (1946), that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens*, 403 U.S. at 396.

Before this Court, petitioners and their *amici* seek to extinguish respondent's well-pled constitutional discrimination claims under *Bivens* and Section 1985(3) because "[t]hey believe that the qualified immunity doctrine provides important legal protections to federal government officials." Amicus Brief of Five Former Attorneys General, 2008 WL 4154531, *1. More candidly, they are concerned, given the Second Court's affirmance and direction that petitioners submit to certain limited discovery related to their defense and respondent's claims, that they "will be unable to win pre-discovery dismissal" of what they characterize as "insubstantial constitutional claims." *Id.*

But the question here before the Court is not whether the respondent's constitutional claims are insubstantial. Rather, the question here is little or no different than it was in *Bivens.* Here, as there, the question most simply put "is merely whether [respondent], if he can demonstrate an injury consequent upon the violation of federal agents of his [constitutional] rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Id.* Given the detailed allegations of respondent's complaint, the liberal pleading standards of the Federal Rules, and this Court's precedents, this is a question that can be answered only one way (*i.e.*, in the affirmative) if *Marbury* and its teachings indeed remain alive.

In the name of "national security," however, petitioners would have this Court effectively overrule *Bivens* and the bedrock principles on which

it stands through the artifice of a thinly veiled heightened pleading standard that neither the Federal Rules nor this Court's precedents will allow. The Court should not create such a pleading bar to "the ordinary remedy for an invasion of personal liberty" just because the petitioners are current and/or former high-ranking governmental officials.

To do as the petitioners have requested will have disastrous consequences for citizens and aliens alike, for it will sound the inevitable death knell to the rights of all persons in the United States to seek redress for constitutional violations suffered at the hands of responsible Government officials, including high-level officials like the petitioners. Particularly in a case like the present one, where the respondent's constitutional claims of discrimination are well supported and entirely plausible, this Court should not countenance such a result.

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: October 31, 2008

CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,986 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 31, 2008.

_____

John E. Higgins

APPENDIX

Amicus Curiae Japanese American Citizens League (JACL) is the nation's oldest and largest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. Founded in 1929, JACL was organized as an educational/social action group in response to prejudice and discrimination directed toward Americans of Japanese ancestry. JACL's mission is to secure and uphold the human and civil rights of Americans of Japanese ancestry and others and to promote and preserve the cultural heritage and values of Japanese Americans. Over the years, JACL has helped to overturn, repeal, or amend more than 600 discriminatory laws and statutes, including but not limited to the Cable Act of 1922, the Emergency Detention Act of 1950, and the Immigration and Nationality Act of 1952. A founding member of the Leadership Conference on Civil Rights, the largest civil rights coalition in the United States, JACL assisted in repealing Idaho's anti-miscegenation law in 1959, joined in the "March on Washington" in 1963 with Dr. Martin Luther King to demonstrate its commitment to insuring complete civil rights for all Americans, and in 1944, JACL filed an amicus legal brief in *Korematsu v. United States*, 323 U.S. 214 (1944) in support of the Petitioner. In 1978-81, JACL was instrumental in persuading Congress to establish the Commission on Wartime Relocation and Internment of Civilians, which made findings and recommendations on the wartime incarceration of Japanese Americans. JACL also took a leading role in advocating for

passage of the Civil Liberties Act of 1988, which provided an apology and $20,000 in compensation to then-living individuals who were interned or had their rights abridged during World War II.

Amicus Curiae Sikh American Legal Defense and Education Fund (SALDEF) is the oldest and largest Sikh American civil rights and advocacy organization in the United States. SALDEF's mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations through legal assistance, legislative and media advocacy, and educational outreach. Founded in 1996, and originally named the Sikh Mediawatch and Resource Task Force (SMART), SALDEF has provided free legal assistance to Sikhs in the United States since 1997. SALDEF was the first Sikh American organization to create a training program for first responders in July 1999; SALDEF's Law Enforcement Partnership Program has now trained over 35,000 individuals, including the FBI, DOJ, White House officials, and other public agencies, at the federal, state and local level and has collaborated with federal agencies to produce Sikh American awareness posters: Following the attacks of September 11, SALDEF met with the Secretary of the U.S. Department of Transportation on the "appropriate and sensitive" handling of Sikh American passengers; and has participated in regular meetings with top government officials, including the FBI Director, Attorney General, Secretary for Department of Homeland Security, and Assistant Attorney General for Civil Rights in its

efforts to protect the civil rights and liberties and religious freedoms of Sikh Americans and others.

Amicus Curiae Pakistani American Public Affairs Committee (PAKPAC) is a non-profit, non-partisan organization dedicated to fostering greater political and civic engagement amongst Pakistani Americans. Since 1990, PAKPAC has worked tirelessly to preserve, protect and promote the ideals of civil liberties cherished by all Americans. In the aftermath of September 11th, PAKPAC has proactively worked to develop the education and training of both community members and law enforcement personnel in an effort to strengthen constitutional rights and protections.

Amicus Curiae National Korean American Service & Education Consortium (NAKASEC) was founded in 1994 as a consortium of local community centers throughout the United States focused on the civil rights and education of Korean Americans. NAKASEC's mission is to project a national progressive voice on major civil rights and immigrant rights issues and promote the full participation of Korean Americans in American society. Through its Civil Rights Advocacy Program, NAKASEC seeks to educate and engage the Korean American community and others on major civil rights issues regionally and nationally, monitoring legislation and policies, producing educational materials and collaborating in coalitions seeking to protect the civil rights of all Americans. NAKASEC's community outreach efforts have helped Korean Americans develop awareness about civil rights issues, many for the first time.

Amicus Curiae Muslim Advocates is a non-profit organization created in 2005 as a sister entity to the National Association of Muslim Lawyers (NAML), a professional association of approximately 500 Muslim lawyers, law students and other legal professionals. Muslim Advocates is committed to a world in which equality, liberty, and justice are guaranteed for all, regardless of faith, and in which the Muslim American legal community is vital to promoting and protecting these values. In pursuit of this vision, Muslim Advocates' mission is to promote equality, liberty, and justice for all by providing leadership through legal advocacy, policy engagement, and civic education, and by serving as a legal resource to promote the full and meaningful participation of Muslims in American public life.